Supreme Court, U.S.
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No. 07-127

In the
Supreme Court of the United States

WEDGEWOOD HEALTH CARE REALTY, LLC,
dba Galion Nursing and Rehabilitation Center,
Petitioner,

v.

THE OHIO DEPARTMENT OF HEALTH,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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July 30, 2007

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QUESTIONS PRESENTED

The petitioner unsuccessfully challenged in State court the unlawful and unconstitutional conduct of the Ohio Department of Health in conducting an administrative proceeding. Petitioner asserts the Ohio Department of Health violated its due process rights in connection with an administrative proceeding by relying on evidence not in the administrative record as the basis of the decision.

The questions presented are as follows:

1. Did the Ohio Supreme Court err in failing to find that the Ohio Department of Health must confine its review and base its decision upon the record on which the hearing examiner based his report and recommendation?

2. Did the Ohio Supreme Court err in failing to find that the party objecting to a certificate of need application recommended for approval, not the applicant, must establish by a preponderance of the evidence that the project is not needed or is not in accordance with applicable state law?

3. Did the Ohio Supreme Court err in failing to find that the Ohio Department of Health violated Ohio law and petitioner's due process rights by failing to serve petitioner with a copy of the administrative hearing examiner's report and recommendation in accordance with Ohio's Administrative Procedure Act?

RULE 14.1(B) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is a follows:

Petitioner: Wedgewood Health Care Realty, LLC, dba Galion Nursing and Rehabilitation Center

Respondent: The Ohio Department of Health

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PETITION FOR WRIT OF CERTIORARI

Petitioner Wedgewood Health Care Realty, LLC, dba Galion Nursing and Rehabilitation Center respectfully petitions for a writ of certiorari to review the specified judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The Director of the Ohio Department of Health entered an Adjudication Order on March 10, 2006 (Appendix ["App."] F, *infra*), by adopting the Report and Recommendation of Administrative Hearing Examiner William J. Kepko issued January 24, 2006 (App. G, *infra*). The Tenth District Court of Appeals, Franklin County, Ohio, issued an Opinion dated December 19, 2006 (App. D, *infra*) and a Judgment Entry dated December 20, 2006 (App. E, *infra*) affirming the Adjudication Order on the basis that it was supported by reliable, probative and substantial evidence and was in accordance with the law. The Tenth District also issued a Memorandum Decision on Reconsideration dated February 8, 2007 (App. C, *infra*), and Journal Entry on Reconsideration issued February 8, 2007 (App. B, *infra*). A Notice of Appeal and Memorandum in Support of Jurisdiction was denied by the Ohio Supreme Court in an Entry filed on May 2, 2007 (App. A, *infra*).

JURISDICTION

The denial by the Ohio Supreme Court of a Notice of Appeal and Memorandum in Support of Jurisdiction was filed on May 2, 2007. This petition is accordingly filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction over the appeal is invoked pursuant to 28 U.S.C. §§ 1257(a), 2101(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT V, PROVIDES IN PERTINENT PART:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

THE CONSTITUTION OF THE UNITED STATES AMENDMENT XIV, PROVIDES IN PERTINENT PART:

> Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RELEVANT PORTIONS OF THE OHIO REVISED CODE, SECTION 119.09, AND OHIO ADMINISTRATIVE CODE, SECTION 3701-12-20 ARE INCLUDED IN APP. H, infra.

STATEMENT OF THE CASE AND FACTS

Petitioner seeks review of the determination by the Ohio Supreme Court that the conduct of the state of Ohio in this matter did not violate Petitioner's constitutional right to due process. Petitioner maintains that the Ohio Department of Health (the "Department") violated Petitioner's constitutional right to due process and Ohio's Administrative Procedure Act when it failed to confine its review of an administrative hearing examiner's report and recommendation to the administrative record and used post hearing information outside the administrative record as the basis for its final adjudication order.

This matter involves an application by Wedgewood Health Care Realty, LLC (hereinafter "Wedgewood") for a certificate of need from the Ohio Department of Health (the "Department") to construct a new $5,705,000 nursing facility in Galion, Ohio, to be known as Galion Nursing and Rehabilitation Center, and to relocate fifty nursing home beds from an older facility which was closing. The state of Ohio has placed a moratorium on the total number of licensed nursing home beds in Ohio and a certificate of need is required to relocate nursing home beds from one site to another.

Following the Department's review of Wedgewood's application, which included a review of objections filed by the Service Employees International Union ("SEIU"), the Department staff recommended approval of the project. The recommendation was based on the staff report of John A. Hoffman, who was himself a member of the SEIU.

The SEIU continued to object and requested an evidentiary hearing before an administrative hearing examiner (the "Examiner"). Following the hearing the Examiner issued a Report and Recommendation (the "Report") to the Department. The Report, in violation of state law was not issued for months after receipt by the Department. The Report made the following findings in support of Wedgewood's application:

III. FINDINGS OF FACT

. . .

24. Construction of the facility is necessary to meet the needs of residents in Crawford County, particularly if the number of over-65 in Crawford County will increase as predicted.

. . .

28. . . . The Applicant has . . . demonstrated the cost-effectiveness of the proposed project relative to remodeling Atwood Manor.

. . .

32. . . . The Applicant has . . . provided sufficient information regarding its history of servicing medically under served groups.

. . .

IV. CONCLUSIONS OF LAW

. . .

2. The Objectors have not overcome their burden of proving that the project is not needed or that the Applicant has not adequately demonstrated the impact of this project on other Crawford County nursing facilities.

. . .

9. The Applicant has provided by a preponderance of the evidence that the project is financially feasible and cost effective.

Notwithstanding these findings and the Department's recommendation for approval the Examiner recommended that the Department not approve the application, finding that it was not in accordance with sections 3701-12-20(J)(5) and 3701-12-20(R) of the Ohio Administrative Code. App. H, *infra*. These two rules relate to the historical performance of "related party" facilities. The SEIU had argued without submitting evidence that Frank Murphy, who owns a controlling interest in Wedgewood, owns a controlling interest

in several other nursing homes in Ohio that serve the Medicaid population and is, therefore, a "related party" for purposes of the application. Frank Murphy, however, does not own an interest in any other nursing facility which is considered a "related party" to Wedgewood under any certificate of need rule or definition. Based on this Report the Department reversed its earlier recommendation and issued an Adjudication Order (the "Order") denying Wedgewood's application.

That Order illustrates, as follows, the Department's plain violation of Ohio law and Wedgewood's right to due process guaranteed under the United States Constitution. First, Ohio's Administrative Procedures Act, Ohio Revised Code Chapter 119, requires that a report and recommendation be served on the parties within five days of receipt by the agency. See O.R.C. 119.09 ("A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by certified mail."). The Order plainly admits: "ODH did not send the Report and Recommendation of the Examiner within 5 days of receiving it from the Examiner." App. 27a-28a. Second, section 3702.52(C)(4) of the Ohio Revised Code states in pertinent part, "the [Department] shall base decisions concerning applications for which an adjudication hearing is conducted under division (C)(3) of this section on the report and recommendations of the hearing examiner." R.C. 3702.52(C)(4). In an unequivocal violation of that directive, the Order states: "A post-hearing CON staff search of records revealed a CON granted to Sunbury Realty, LLC. . . . The records further indicate that Mr. Murphy is the owner of Sunbury Realty, LLC." [Emphasis added.] App. 31a. Without notifying Wedgewood or giving it an opportunity to respond, the Department conducted a post-

hearing examination of evidence which was never previously reviewed by the Department or the Examiner or the parties in connection with Wedgewood's application, and which admittedly was not part of the hearing record to which the Department is confined.

The Franklin County Court of Appeals, Tenth Appellate District, affirmed the Order holding the due process violations were trivial and did not prejudice Wedgewood, despite the fact that the violations were the basis for the Department's Order (App. B, C, D, E). The Ohio Supreme Court declined to accept jurisdiction (App. A).

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

The United States Constitution, the Ohio Constitution, the Ohio Administrative Procedures Act (Ohio Revised Code Chapter 119), and the Ohio Certificate of Need Program (Ohio Revised Code Chapter 3702), generally, and O.R.C. 3702.52, specifically, require the Department to afford certificate of need applicants the basic tenets of due process, i.e., notice and a meaningful opportunity to be heard. U.S. Constitution, Amendments V and XIV, Ohio Constitution, Art. I, § 16, O.R.C. Chapter 119; O.R.C. 3702.52. Ohio hearing examiners generally are required to base their decision on evidence in the record fully subjected to examination at hearing. See R.C. 119.09. The Ohio General Assembly also recognizes this right to due process in the specific proceeding at issue here. Ohio law requires the Department to base its decision concerning a certificate of application solely upon the record evidence considered by the hearing examiner. O.R.C. 3702.52(C)(4).

The Franklin County Court of Appeals, Tenth Appellate District abandoned all fundamental due process in favor of expediency. While the court conceded that "an agency should not base its decision upon matters outside the record (and in the absence of notice to the parties)" (App. at 3a), it allowed the Department to do just that. The Department based its decision in the Order upon a post hearing investigation of unspecified, and still unidentified, records, unknown and undisclosed to the parties. Wedgewood, the applicant in this appeal, was never given the opportunity to see, much less contest, this so-called "evidence" relied upon by the Department as the basis for its decision.

The extraordinary steps taken by the Department, given full sanction by the Ohio courts, are more egregious in light of the fact that the Ohio General Assembly authorizes remand to the hearing examiner to take additional testimony and evidence if a question arises during the Department's review. See O.R.C. 119.09 ("The agency may order additional testimony to be taken or permit the introduction of further documentary evidence."). Instead of complying with the law, the Department engaged in an extra-judicial investigation and based its decision upon that investigation without affording Wedgewood the opportunity to confront the evidence used against it. Such cavalier decision-making begs the question: Why hold a hearing if the applicant will not be afforded the opportunity to address all evidence presented against it?

The Ohio courts' reckless disregard for due process eviscerates the hearing rights of any Ohioan who attempts to avail themselves of guaranteed protections. The courts' passivity grants any executive agency charged with conducting hearings the authority to circumvent the Constitutions and statutory safeguards, thereby rendering them meaningless. The Ohio courts have from the bench,

in effect, repealed O.R.C. 119.09 an action the Ohio General Assembly would never contemplate.

II. THE DEPARTMENT MUST CONFINE ITS REVIEW AND BASE ITS DECISION UPON THE RECORD ON WHICH THE EXAMINER BASED HIS REPORT AND RECOMMLNDATION.

Section 3702.52(C)(4) of the Ohio Revised Code states, in pertinent part, "[t]he director shall base decisions concerning applications for which an adjudication hearing is conducted under division (C)(3) of this section on the report and recommendations of the hearing examiner." [Emphasis added.] O.R.C. 3802.52(C)(4). The Department may consider evidence such as the transcript of testimony upon which the report and recommendation is based. *In re Certificate of Need Application of Providence Hospital* (1990), 67 Ohio App.3d 391, 587 N.E.2d 326, *appeal denied,* (1990), 54 Ohio St.3d 704, 561 N.E.2d 546. Also, pursuant to O.R.C. 119.09, the Director may make *de novo* findings if the findings are supported by the record. *Pushay v. Walter* (Sept. 20, 1984), Franklin App. No. 83AP-1103.

There is no doubt in this case, however, that the Department took the extraordinary and unlawful step of considering evidence outside the record in violation of Wedgewood's due process rights. The Department correctly recited the requirements of law: "WHEREAS, R.C. 3702.52 requires the Director to base a decision concerning an application for which an adjudication hearing is conducted on the Report and Recommendation of the hearing officer" [Emphasis added] (App. at 26a), but then conducted an independent investigation into unrelated documents anyway. The Department's Order specifically finds: "A post-hearing staff search of records revealed a CON granted to Sunbury

Realty, LLC for Morning View Care Center of Sunbury, ODH File Number 1493-02-03 on February 19, 2004." [Emphasis added.] App. at 31a. The "staff search" corralled records outside the record testimony and evidence which (1) were not part of the certificate of need application process; (2) were not offered into evidence, and (3) were not the basis of testimonial evidence. The Department's staff conducted a search independent of the hearing record and the Department based its Order on the results of that search. Such conduct is impermissible under the law and state and federal constitutions and outside the scope of authority for review pursuant to O.R.C. sections 119.09 and 3702.52.

While the Ohio courts recognized an agency should not base its decision on matters outside the record, they nevertheless concluded the Department need not rely on the record if "the objectionable matters cited in the director's decision constituted evidence that was already before the hearing examiner by way of testimony and exhibits." App. at 3a-4a. There is absolutely no support in the law or by rule for this conclusion. It simply is wrong. The language of the law is clear and unambiguous on this point. Further in the absence of viewing the post hearing records purportedly reviewed one cannot logically say what the materials are (if they exist at all).

In the event the Department desired more evidence on this matter, it had the authority to conduct additional inquiry within the boundaries of law. Specifically, O.R.C. 119.09 provides, "the agency may order additional testimony to be taken or permit the introduction of further documentary evidence." O.R.C. 119.09. But only after ordering additional testimony be taken or further documentary evidence be introduced, can the agency then approve, modify, or disapprove the Report and Recommendation. *Id.* The

prejudice to Wedgewood is clear. The Department based its entire decision on records not subject to scrutiny either via direct examination or cross examination and Wedgewood was given no opportunity to rebut evidence and findings which are in fact incorrect. To compound matters more, Wedgewood is unable to effectively appeal these findings because it has no rebuttal evidence in the record; and the record has no rebuttal evidence because the evidence relied on by the Department is not in the record. This treatment violates due process of law. Had Wedgewood been given the opportunity to speak on the issue, the Department would have learned, among other facts, that the referenced "Sunbury Realty project" is under construction and has no historical performance to evaluate pursuant to the Department's certificate of need evaluation rules. Thus, sections 3701-12-20(J)(5) and 3701-12-20(R) of the Ohio Administrative Code have no application to this matter.

The Ohio courts upheld the Department's action based upon a lack of prejudice to Wedgewood. The courts essentially concluded that the Department *could have* relied on the testimony of one particular witness to support its decision, despite the fact that neither the Department nor the Examiner did so. Instead, the Department went outside the scope of the Report and outside the scope of the record itself. It did not consider evidence such as the transcript of testimony upon which the Report and Recommendation was based as it is allowed to do. See, *In re Certificate of Need Application of Providence Hospital* (1990), 67 Ohio App.3d 391. The Department did not make *de novo* findings as if those findings were supported by the record as is its privilege. See, *Pushay v. Walter* (Sept. 20, 1984), Franklin App. No. 83AP-1103.

The Ohio courts based their determinations on what the Department ***could have done rather than what it actually did.***

The Department could have looked at the transcript and concluded that testimony supported its findings. It did not do so. It could have made *de novo* findings based on the record. It did not do so. It could have ordered additional testimony per R.C. 119.09. It did not do that either. Instead, the Department says it conducted its own post hearing evidentiary investigation. But ***no one knows what the Department actually relied upon, as it is not part of the record.*** The Department's action was a flagrant violation of due process sadly sanctioned by the Ohio courts. A remand to require the Department to show what it considered and give opportunity to present evidence upon the post hearing activity of the Department is what due process requires.

The Ohio courts set a dangerous precedent in concluding that the Department may base its determination on an extra-judicial post-hearing investigation. While the courts may find this result expeditious, doing so grants the Department and other Ohio agencies the carte blanche authority to torture facts until they capitulate the pre-determined result. There is no record of the evidence upon which the Department actually relied for it decision. What purpose is a hearing when the agency is free to conduct secret examinations of undisclosed "records?"

III. THE PARTY OBJECTING TO A CERTIFICATE OF NEED APPLICATION MUST ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE PROJECT IS NOT NEEDED OR IS NOT IN ACCORDANCE WITH THE LAW.

Section 3702.52(C)(3) of the Ohio Revised Code specifies that an objector to a certificate of need application bears the burden of proving by a preponderance of the evidence that the certificate of need project is not needed or that granting the

certificate of need would not be in accordance with the laws of the Ohio Certificate of Need Program, specifically O.R.C. sections 3702.51 to 3702.62. Section 3702-2-06(D) of the Ohio Administrative Code further provides that the party requesting the hearing, not the applicant, has the burden of proof by a preponderance of the evidence. See also, *In the Matter of Manor Care of Kettering* (Dec. 31, 1992), Franklin App. Nos. 92AP-208, 92AP-229.

In this matter, the Examiner improperly shifted the burden of proof from the objecting party (SEIU) to Wedgewood. The Examiner factually found that "the Applicant did not deny that construction had begun on this Facility." App. at 43a. But Wedgewood's failure to deny an unsupported allegation is irrelevant. It is incumbent upon the objecting party to prove its allegation, i.e., that construction began without a certificate of need. Such a fundamental error in burden shifting demonstrates the Examiner's confusion. The result of this improper burden shifting is most evident in Finding of Fact 40 which found: "The Applicant has failed to address any other CON applications filed by related parties." App. at 50a. The burden is on the objecting party, not the applicant, also to present this evidence and prove this issue. Notwithstanding Finding of Fact 40, when the Department initially reviewed Wedgewood's application it was recommended for approval. The Department actually found the project to be in conformity with Ohio's certificates of need laws, including that to which objectors made issue. The SEIU failed to rebut these findings with testimony or evidence of any kind.

The Department's staff report in fact specifically details consideration of other facilities owned and operated by Frank Murphy. Thus, if other business investments of Frank Murphy constitute "related parties" it is clear that the record

does in fact contain them, and that there has been consideration of their historical performance.

a. INVESTMENTS OF A CERTIFICATE OF NEED APPLICANT'S OWNER ARE NOT "RELATED PARTIES" AS DEFINED IN OAC 3701-12-01(QQ).

The term "Related Person" is defined as "an affiliated person or an individual, who by virtue of blood or adoption, is the spouse, father, mother, sister, brother, half-sister, half-brother, grandmother, grandfather or first cousin of an PTCN." O.A.C. 3701-12-01(QQ). Obviously, other corporate business entities in which Mr. Murphy has an investment interest are not blood relatives of Mr. Murphy. The inquiry then becomes whether those other business investments of Mr. Murphy are an "affiliated person" as defined in the Administrative Code. Only if these other investment interests are "affiliated persons" can they be considered a "related person."

Again the Ohio Administrative Code does not support the Examiner's presumptive conclusion. An "affiliated person" is defined as:

> a corporation, business trust, estate, firm, partnership, association, joint stock company, insurance company, government unit, or other entity **that**:
>
> (1) Has an ownership or beneficial ownership interest, either direct or indirect, of five percent or more of the voting stock of the person transferring a Certificate of Need (PTCN); (2) Participates as a general, junior, or limited partner in a partnership with the PTCN; (3) shares a common officer, director, member, trustee,

> or partner with the PTCN; (4) shares twenty-five percent or more of its employees with the PTCN; (5) loans twenty-five percent or more of the total capital needed to implement the activity, either directly or through a loan guarantee or similar arrangement, to the PTCN; (6) locates the site or allows the location of the site of the activity on its campus or on its property; or (7) enters and agreement with the PTCN as part of the name of the healthcare facility or service. [Emphasis added.]

O.A.C. 3701-12-01(B)

Frank Murphy is not a PTCN (i.e., person transferring a certificate of need); Wedgewood is not transferring a certificate of need; and no one in this matter is transferring a certificate of need. Thus, the definitional term is not met and there are no "affiliated persons" in this matter. Because there are no "affiliated persons" there is no "related person" to be considered.

If by some improper, extended, stretch of the definitional terms one considers the other nursing facilities in which Mr. Murphy invests to be related to Wedgewood (which the Administrative Code's rules governing the certificate of need program clearly do not permit) the record does contain evidence that the Department's certificate of need review staff did in fact consider their performance.

IV. THE OHIO DEPARTMENT OF HEALTH MUST SERVE A COPY OF THE EXAMINER'S REPORT WITHIN FIVE DAYS OF THE FILING OF THAT REPORT.

Section 119.09 of the Ohio Revised Code states, in part, "[t]he referee or examiner shall submit to the agency a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by certified mail." [Emphasis added.]

There is no question here that the Department failed to send the Report to Wedgewood within five days of receiving it from the Examiner. Citing questionably authoritative cases from 1946, 1979, and 1982, the Ohio courts concluded the five day time requirement is discretionary rather than mandatory and no prejudice attaches. More recent holdings, however, find just the opposite. The appellate provisions of Revised Code Chapter 119 require strict compliance. See, *Hughes v. Ohio Dept. of Commerce* (2007), 114 Ohio St.3d 47; *Harrison v. Ohio St. Med. Bd.* (1995), 103 Ohio App.3d 317; *Foster v. Cuyahoga Cty. Bd. of Commrs.* (Mar. 21, 2000), Franklin app. 99AP-795, unreported, 2000 WL 290224; *In re Haddix* (June 13, 1985), Franklin App. No. 85 AP-124, unreported, 1985 WL 10323. Strict compliance is required not only of the citizenry, but also of the state itself. "Strict compliance means strict compliance." *Bailey v. Ohio Dept. of Adm. Services* (2000), 114 Ohio Misc. 2d 48, 759 N.E.2d 490. The *Bailey* court explained that the *state agency* must strictly comply with R.C. Chapter 119 as well citing *Sun*

Refining & Marketing Co. v. Brennan (1987), 31 Ohio St.3d 306.

The reasoning in *Bailey* applies here as well. Simply because the Department feels the parties were not prejudiced by the failure to serve the Report within the statutorily mandated five days, does not alleviate the responsibility to do so. The Department is misguided if it actually believes Wedgewood was not prejudiced, for the Department was not remiss by just a few days: service upon Wedgewood was delayed for *more than year* and a copy of the Report was not provided until Wedgewood contacted the Department regarding the decision. Undue delay in approval of such a decision results in a delay in construction, licensure and operation of the home, the unnecessary incurrence of interest and construction financing cost, and is a disservice to the citizens needing health services. There is a reason the Ohio General Assembly placed an affirmative duty upon the Department to act in an expeditious fashion. The Ohio General Assembly understands the devastating cost of delay, a realization lost upon the Ohio courts.

The Ohio courts seem to imply that the time requirement here is inconsequential so it is actually directory rather than mandatory. However, Ohio courts have not found it inconsequential for an applicant to inadvertently file an original notice appeal, as opposed to a copy of one, with the court. *In re Haddix, supra*. Such an error seems far less harmful, yet the Ohio courts have invalidated appeals based upon this procedural inconsequentiality. *Id.* Either all of Revised Code Chapter 119 mandates strict compliance, or all of it must be considered directory. It is unconscionable for administrative agencies to be held to a lower standard regarding administrative procedure than the standard to which the common citizen is held.

CONCLUSION

Therefore, and for all the foregoing reasons, petitioner Wedgewood Realty, LLC, respectfully request that this Court issue a Writ of Certiorari to the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE SUPREME COURT OF OHIO

Case No. 2007-0181

[Filed May 2, 2007]

In the Matter of: Wedgwood Realty, LLC

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Franklin County Court of Appeals; No. 06AP273)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 06AP-273
(O.D.H. No. 8940-01-05)

[Filed February 8, 2007]

In the Matter of:	)
Wedgewood Realty, LLC,	)
(Appellant).	)
	)

MEMORANDUM DECISION

Rendered on February 8, 2007

Geoffrey E. Webster, J. Randall Richards, and *Paul V. Disantis,* for appellant.

Hunter, Camahan, Shoub & Byard, Michael J. Hunter, and *Cathrine J. Harshman,* for appellees Tonya Sheets and SEIU/District 1199.

Marc Dann, Attorney General, and *Melinda Snyder Osgood,* for appellee Ohio Department of Health.

ON APPLICATION FOR RECONSIDERATION

BROWN, J.

{¶1} Appellant, Wedgewood Realty, LLC, has filed an application for reconsideration of this court's decision in *In the Matter of Wedgewood Realty, LLC,* Franklin App. No. 06AP-273, 2006-Ohio-6734, in which this court affirmed the order of the Ohio Department of Health ("ODH") denying appellant's application for a certificate of need ("CON").

{¶2} App.R. 26 permits a party to request that an appellate court reconsider its decision. In considering an application for reconsideration "[t]he test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews* (1982), 5 Ohio App.3d 140, 143.

{¶3} In its application, appellant argues, as it did in its direct appeal, that the order of ODH is void because the director considered evidence outside the record without giving notice or the opportunity to be heard to the parties. Specifically, appellant challenged language from the director's decision stating: "A post-hearing CON staff search of records revealed a CON granted to Sunbury Realty, LLC for Morning View Care Center of Sunbury * * *. The records further indicate that Mr. Murphy is the owner of Sunbury Realty, LLC." This court previously addressed this argument, holding in part:

> While we agree with the general proposition that an agency should not base its decision upon matters outside the record (and in the absence of notice to the parties), appellant cannot show prejudice in the instant case because the objectionable matters cited in the

> director's decision constituted evidence that was already before the hearing examiner by way of testimony and exhibits.

In the Matter of: Wedgewood Realty, supra, at ¶25.

{¶4} This court's opinion cited record evidence indicating that a CON had been granted to Sunbury Realty, LLC, regarding the Morning View Care Center of Sunbury, as well as record evidence that Frank Murphy holds a "100% ownership interest in Sunbury Realty, LLC." (Objector's Exhibit No. 6 and accompanying memorandum.) Thus, this court concluded, "the matters referenced by the director as part of an agency search were cumulative to the record before the hearing examiner[,]" *In the Matter of: Wedgewood Realty,* supra, at ¶28.

{¶5} Appellant's argument on this issue in its application does not raise an issue not already addressed in this court's previous opinion; further, appellant's mere disagreement with this court's opinion is insufficient to meet the test for granting a motion for reconsideration. *Nunley v. Wayne Builders Corp.* (Aug. 12, 1999), Franklin App. No. 98AP-1202. See, also, *State v. Burke,* Franklin App. No. 04AP-1234, 2006-Ohio-1026, at ¶2: ("An application for reconsideration is not designed for use in instances where a party simply disagrees with the logic or conclusions of the court"). Similarly, the remaining issues raised by appellant in its application, in which it argues ODH failed to timely serve a copy of the hearing examiner's report, and that the hearing examiner improperly shifted the burden of proof, were previously addressed by this court.

{¶6} Based upon a review of appellant's application, we conclude that the application does not call to our attention an

obvious error in our decision, nor does it raise a matter that was not considered at all, or was not fully considered by this court when it should have been. Accordingly, appellant's application for reconsideration is hereby denied.

Application for reconsideration denied.

BRYANT and FRENCH, JJ., concur.

APPENDIX C

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 06AP-273
(O.D.H. No. 8940-01-05)

[Filed February 8, 2007]

In the Matter of:	)
Wedgewood Realty, LLC,	)
(Appellant).	)
	)

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered on February 8, 2007, it is the order of this court that appellant's December 28, 2006 application for reconsideration is denied. Costs are assessed against appellant.

BROWN, BRYANT, & FRENCH, JJ.

/s/
Judge Susan Brown

APPENDIX D

COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY

No. 06AP-273

[Filed December 19, 2006]

In the Matter of:	)
Wedgewood Realty, LLC,	)
(Appellant).	)
	)

APPEAL from the Ohio Certificate of Need Review Board. (O.D.H. No. 8940-01-05).

Geoffrey E. Webster and *J. Randall Richards*, for appellant.

Hunter, Carnahan, Shoub & Byard, Michael J. Hunter, and *Cathrine J. Harshman*, for appellees Tonya Sheets and SEIU/District 1199.

Jim Petro, Attorney General, and *Melinda Snyder Osgood*, for appellee Ohio Department of Health.

JUDGES: BROWN, J. FRENCH and McCORMAC, JJ., concur. McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

OPINION

BROWN, J.

{¶1} This is an appeal by appellant, Wedgewood Realty, LLC, from an order of the Ohio Department of Health ("ODH"), denying appellant's application for a certificate of need ("CON"), in which appellant sought to relocate 50 nursing facility beds from Atwood Manor, Galion, Ohio, to a new nursing facility.

{¶2} The following facts are taken primarily from a report and recommendation of an ODH hearing examiner ("hearing examiner"), following a hearing conducted on October 3, 2005. On January 18, 2005, Atwood Manor, a nursing home located in Galion, closed operation because its owner could not meet the current requirements for certification and licensure. On January 19, 2005, appellant, an entity owned by Frank Murphy ("Murphy"), filed a CON application, seeking approval of a project to relocate 50 nursing facility beds from Atwood Manor to a newly constructed facility, also to be located in Galion, and to be named the Galion Nursing and Rehab Center. The initial estimated cost of the project was $5,705,000.

{¶3} On February 3, 2005, ODH issued a request for additional information. Appellant responded to the request on March 23, 2005, and in its response indicated that the project cost now exceeded $6,000,000. On March 30, 2005, ODH issued a second request for additional information, and appellant responded to this request on May 5, 2005. ODH declared the CON application complete on May 20, 2005, but requested additional information, and informed appellant of its requirement to publish certain public notices regarding the project. Appellant subsequently published the notices.

{¶4} On June 17, 2005, Tonya Sheets ("Sheets"), on behalf of the Services Employees International Union ("SEIU"), filed objections to appellant's CON application. Specifically, in its objections, SEIU contended that the applicant: (1) failed to demonstrate the need for the facility and failed to show the impact of this project on other Crawford County nursing facilities; (2) proposed unrealistic operating projections; (3) failed to demonstrate the cost effectiveness of the proposed project; (4) provided incomplete information and failed to respond fully to subsequent questions from ODH; and (5) failed to implement at least one prior approved CON project. Sheets further requested an adjudication hearing.

{¶5} On July 22, 2005, appellant filed a motion to dismiss the objections and comments filed by Sheets and SEIU, asserting in part that the objections had not been received by ODH in a timely manner. On August 15, 2005, a hearing examiner denied the motion to dismiss, finding that Sheets and SEIU were "affected persons," and that the objections were timely filed with ODH.

{¶6} In a memorandum dated September 19, 2005, ODH recommended approval of the project. The recommendation was based upon a staff report prepared by John A. Hoffman, a health services policy analyst with ODH.

{¶7} The hearing examiner conducted a hearing on October 3, 2005. Cathy Meals, a research analyst with SEIU, testified on behalf of Sheets and SEIU (collectively "objectors"), and gave the following testimony at the hearing. SEIU is a health care and social services union, with approximately 28,000 members. Prior to the closing of Atwood Manor, there were seven nursing care homes in Crawford County; SEIU represents employees at two of those

nursing homes. At the time SEIU filed objections, there were 103 unoccupied beds in Crawford County.

{¶8} On September 8, 2005, Meals drove to the site of the proposed facility and took pictures. A sign at the site read: "Future Site of Galion Nursing and Rehab Center." (Tr. 16.) According to Meals, "construction is well underway at this facility." (Tr. 31.)

{¶9} Meals testified that Murphy owned another entity, Sunbury Realty, and that Murphy had previously filed a CON application to move 30 beds from Sunbury Nursing Home to Morning View Care Center of Sunbury. The project was approved in February 2004, and since that time Murphy had submitted a separate CON application for a 50-bed facility to be known as Loch Lomond Care Center. According to Meals, 30 of those beds were intended to be the 30 beds approved in the Morning View CON. Meals further testified that the Loch Lomond application was denied in May 2005, but refiled again in September 2005, and subsequently withdrawn.

{¶10} Hoffman, a health services policy analyst with ODH, also testified at the hearing. Hoffman reviewed appellant's CON application and prepared a staff report.

{¶11} On January 24, 2006, the hearing examiner issued a report and recommendation, finding that objectors had proven, by a preponderance of the evidence, that the CON application submitted by appellant was "not in accordance with the rules adopted under section 3702.57 of the Revised Code[,]" and "not in accordance with OAC 3701-12-20(J)(5), OAC 3701-12-20(R) and OAC 3701-12-05(A)." More specifically, the hearing examiner found in part: "Applicant has failed to provide any information regarding the historical performance of related parties to the Applicant in providing

cost-effective health care services," and that "[t]he Applicant has failed to address any approved CON applications filed by related parties." Accordingly, the hearing examiner recommended that the director not approve the CON application.

{¶12} Both sides filed objections to the report and recommendation. By order mailed on March 10, 2006, the director of ODH denied appellant's CON application. The decision of the director stated in part:

> * * * The Applicant did not provide sufficient information regarding the historical performance in providing cost-effective health care services by the Applicant and related parties to the Applicant [(OAC 3701-12-20-(J)(5)]. The applicant objected to this conclusion contending that the applicant, * * * (dba GNRC), was a newly formed entity and that it and its sole member, Frank Murphy, had no related parties. In support of this contention the applicant cited definitions of "Related Person" and "Affiliated Person" contained in OAC 3701-12-01 OAC. Applicant stated that those definitions pertain to persons transferring a CON, and since neither the Applicant nor Mr. Murphy is transferring a CON there is no "related person" to be considered.
>
> However, OAC 3701-12-20(J)(5) refers to the term "related party," not "related person." OAC 3701-12-08(B) states "[e]ach applicant shall submit one original and one copy of the application forms and attachments prescribed by the director." In accordance with R.C. 3702.52(B), these forms provide a format for the presentation of the information required by the CON rules. The criteria contained in OAC 3701-12-20 are

presented in a series of items providing specific directions and requesting specific information to satisfy those requirements.

* * *

The application showed that Mr. Murphy had an ownership interest in other nursing facilities and some information on those facilities was provided. However, information on the costs and payment rates, and information to explain them such as case-mix and special services or populations was not provided for those facilities. This information is needed to form an opinion on the cost-effectiveness of his operations and the likelihood that the proposed facility will be operated in a cost-effective way. This information is even more important when the applicant is a new business entity, as is the case here, because it does not have a track record of its own. Therefore I find that the Applicant did not provide sufficient information for me to determine whether OAC 3701-12-20(J)(5) has been met.

* * * The Applicant failed to address any approved CON applications filed by related parties * * *. OAC 3701-12-20(R) requires the Director to consider the historical performance of the applicant and related parties in complying with previously granted certificates of need. * * *

* * *

In response to this item the sponsor responded "Not applicable." This response was interpreted to mean that the applicant or a related party had not been

> granted a CON as described in 10.34, although no explicit statement to that effect was made. There was testimony at the hearing indicating that Mr. Murphy, as owner of Sunbury Realty, LLC had received an approved CON in 2003. The Applicant did not provide additional information at the hearing regarding the response to this item in the application. A post-hearing CON staff search of records revealed a CON granted to Sunbury Realty, LLC for Morning View Care Center of Sunbury, ODH File Number 1493-02-03, on February 19, 2004. The records further indicate that Mr. Murphy is the owner of Sunbury Realty, LLC.

{¶13} On March 20, 2006, appellant filed an appeal with this court from the order of the director. Appellant raises the following assignment of error for this court's review:

> THE ADJUDICATION ORDER OF THE OHIO DEPARTMENT OF HEALTH IS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND IS NOT IN ACCORDANCE WITH LAW.

{¶14} This court's standard of review in considering an appeal from a director's ruling on a CON application is set forth under R.C. 3702.60(F)(3), which states:

> The court shall affirm the director's order if it finds, upon consideration of the entire record and any additional evidence admitted under division (F)(2) of this section, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order.

{¶15} We will first address appellant's assertion that ODH failed to serve a copy of the hearing examiner's report and recommendation within five days as required by R.C. 119.09. Appellant maintains that the failure to do so resulted in prejudice.

{¶16} R.C. 119.09 provides in relevant part:

> * * * The referee or examiner shall submit to the agency a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. * * *

{¶17} Appellant maintains that undue delay in the approval of a CON results in a delay in licensure, and is a disservice to the citizens needing the facility's services. Appellant claims prejudice in the instant case because service was "delayed over months."

{¶18} At the outset, the record fails to support appellant's contention that service was delayed for months. The hearing examiner's report was issued on January 24, 2006, and the certificate of service indicates that a copy was sent to the department on that date by regular mail. The record further indicates that a copy of the hearing examiner's report was sent

to counsel for appellant by certified mail on February 8, 2006, and appellant filed objections to the hearing examiner's report on February 13, 2006.

{¶19} Furthermore, "'[a]s a general rule, a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure.'" *State ex rel. Ragozine v. Shaker,* 96 Ohio St.3d 201, 2002 Ohio 3992, at P13, 772 N.E.2d 1192, quoting *State ex rel. Jones v. Farrar* (1946), 146 Ohio St. 467, 66 N.E.2d 531.

{¶20} This court has previously construed the provisions of R.C. 119.09, including the five-day time requirement, as directory, not mandatory. See *Tyus v. Longview State Hosp.* (Feb. 13, 1979), Franklin App. No. 78AP-627, 1979 Ohio App. LEXIS 12101 (even though referee's report was not served upon appellant or his attorney within five days, appellant was not prejudiced as appellant's attorney became aware of report in time to file objections); *Gibson v. Ohio Real Estate Comm.* (Apr. 22, 1982), Franklin App. No. 81AP-811, 1982 Ohio App. LEXIS 13212 (construing R.C. 119.09 and holding that "only the giving of the notice is essential, the time of giving such notice being for the purpose of expediting the proceedings"). Similarly, in the instant case, the record fails to show appellant has suffered prejudice as a result of any delay.

{¶21} We will next address appellant's contention that the adjudication order is void because the director considered evidence outside the record without giving the parties notice and an opportunity to be heard. Specifically, appellant challenges the following language from the director's decision: "A post-hearing CON staff search of records

revealed a CON granted to Sunbury Realty, LLC for Morning View Care Center of Sunbury, ODH File Number 1493-02-03, on February 19, 2004. The records further indicate that Mr. Murphy is the owner of Sunbury Realty, LLC."

{¶22} By way of background, the director made the above-cited finding in considering the provisions of Ohio Adm.Code 3701-12-20(R), which states the director "shall consider the historical performance of the applicant and related parties in complying with previously granted certificates of need." Section 10.34 (Administration) of the CON application addresses this criteria, and states as follows:

> Identify by facility name, address, county and ODH file number (if known) all other certificates of need granted to the applicant within the past five years and certificates of need that have been granted more than five years ago but have been completed within the past five years. For each approved project, provide a description of the approved activity, identify any deviation from the approved activity, discuss any failure to develop the project in accordance with the approved timetable, and identify any fines or settlement agreements associated with the approved project.

{¶23} The director noted that appellant's response on the application to this question was "Not applicable." The director interpreted such response "to mean that the applicant or a related party had not been granted a CON as described in 10.34, although no explicit statement to that effect was made." The director further noted, however, that there was testimony at the hearing indicating that Murphy, as the owner of Sunbury Realty, LLC, had received an approved CON in 2003, and that appellant "did not provide additional

information at the hearing regarding the response to this item in the application."

{¶24} In arguing that the director's decision is void, appellant cites R.C. 3702.52(C)(4), which states in part: "The director shall base decisions concerning applications for which an adjudication hearing is conducted under division (C)(3) of this section on the report and recommendations of the hearing examiner." Appellant acknowledges that, pursuant to R.C. 119.09, the director is authorized to "order additional testimony to be taken or permit the introduction of further documentary evidence." This court has previously noted that this statute also affords the director with discretion to order such additional evidence "even after the hearing examiner issues its written report setting forth findings of fact and conclusions of law." *In the Matter of: Application of Manor Care of Parma,* Franklin App. No. 05AP-398, 2005 Ohio 5703, at P18.

{¶25} Appellant maintains that the director's staff search implicated matters outside the record that did not form the basis of testimonial evidence presented at the hearing. Appellant further contends that it is violative of due process concerns for an administrative agency to consider matters outside the record, and then base its decision on such evidence without affording the parties notice and an opportunity to respond. While we agree with the general proposition that an agency should not base its decision upon matters outside the record (and in the absence of notice to the parties), appellant cannot show prejudice in the instant case because the objectionable matters cited in the director's decision constituted evidence that was already before the hearing examiner by way of testimony and exhibits.

{¶26} More specifically, during the hearing, Meals provided the following testimony in response to an inquiry as to whether appellant had at least one prior CON application not completed:

> * * * In late 2003 Sunbury Realty, which is an LLC owned by Frank Murphy, had a CON application to move 30 beds from Sunbury Nursing Home to Morningview Care Center of Sunbury, which is a facility owned by Frank Murphy, and that project was approved in February of 2004. Since then Mr. Murphy submitted a separate CON application for a facility to be known as Loch Lomond Care Center, which would have 50 beds total, and 30 of those beds were intended to be the 30 beds approved in the Morningview CON, and the Loch Lomond application was denied in May of this year, refiled again, and I think was recently declared incomplete, I think in mid September.

(Tr. 41.)

{¶27} Also admitted at the hearing was Objector's Exhibit No. 6, a letter from ODH to counsel regarding the "Morning View Care Center of Sunbury/Delaware," stating that a CON had been approved for a project located at 14961 N. Old 3C Highway, Sunbury, Ohio, and that the applicant was Sunbury Realty, LLC.[1] The exhibit contained an accompanying memorandum, noting in part the following:

> **Ownership/operation:** The applicant, Sunbury Realty, LLC, is the owner of the Morning View

---

[1] No. 06AP-273

> building and site as well as the operating rights to the LTC beds. Frank Murphy holds 100% ownership interest in Sunbury Realty, LLC. The operator of Morning View is Morning View Delaware, Inc., the lessee of the facility and an unrelated entity to the owner/applicant. * * *

{¶28} Thus, while the director's decision cited the fact that a search of ODH records "revealed a CON granted to Sunbury Realty, LLC for Morning View Care Center of Sunbury, ODH File Number 1493-02-03, on February 19, 2004[,]" and that "[t]he records further indicate that Mr. Murphy is the owner of Sunbury Realty, LLC[,]" none of the facts cited by the director included information not previously presented at the hearing. Because the matters referenced by the director as part of an agency search were cumulative to the record before the hearing examiner, we do not find persuasive appellant's claim of prejudice or a due process violation that would mandate reversal on this issue. See, e.g., *National Labor Relations Bd. v. Johnson* (C.A.6, 1962), 310 F.2d 550, 552 ("to constitute fatal error it must appear that an administrative agency's journey outside the record worked substantial prejudice"), citing *United States v. Pierce Auto Freight Lines* (1946), 327 U.S. 515, 66 S. Ct. 687, 90 L. Ed. 821. We further note that, following the direct examination of Meals, in which she testified that a CON had been granted to Sunbury in February 2004, and that Murphy was the owner of Sunbury Realty, appellant had the opportunity to cross-examine this witness regarding such testimony/evidence.

{¶29} Appellant next contends that the hearing examiner improperly shifted the burden of proof from the objectors to appellant in contravention of R.C. 3702.52(C)(3), which states as follows: "The affected persons bear the burden of proving by a preponderance of evidence that the project is not

needed or that granting the certificate would not be in accordance with sections 3702.51 to 3702.62 of the Revised Code or the rules adopted under section 3702.57 of the Revised Code."

{¶30} Appellant first cites language by the hearing examiner, finding that appellant "did not deny that construction had begun on this Facility[,]" as demonstrating an impermissible shifting of the burden of proof. We disagree.

{¶31} A review of the hearing transcript indicates that the objectors presented the only evidence regarding construction of a facility. This evidence included testimony by Meals that she personally visited the site, and that she took pictures of the site. Those pictures were admitted as exhibits during the hearing. In light of the record presented, we construe the hearing examiner's finding as simply a determination that the objectors carried their burden of proof, and that appellant had not produced any evidence challenging that proof. Thus, we do not find that the hearing examiner relieved objectors of their burden of proving construction had begun, nor do we conclude that the hearing examiner improperly shifted the burden of proof on this issue to appellant.

{¶32} Appellant also challenges the hearing examiner's finding that appellant "has failed to address any other CON applications filed by related parties." Appellant maintains that the objectors failed to rebut the ODH staff report on this issue.

{¶33} In response, ODH argues that ODH staff, in preparing their report, relied upon appellant's representation that the "historical performance of the applicant and related parties" was "[n]ot applicable." ODH maintains that the fact

its staff initially relied upon appellant's response, made in the CON application, does not change the fact that subsequent evidence at the hearing proved otherwise. ODH points to the hearing testimony of Meals, previously cited above, regarding Murphy's involvement with other CON applications and facilities.

{¶34} Again, viewed in context, we do not construe the challenged finding by the hearing examiner as shifting the burden to appellant. Rather, the hearing examiner determined that the objectors met their burden of presenting evidence on this issue through the testimony of Meals and other evidentiary materials previously cited above (which was unrebutted at the hearing), and it was within the province of the hearing examiner to credit such evidence.

{¶35} Appellant also challenges whether Murphy was required to disclose information concerning other nursing homes he owns. On this issue, we note that both the hearing examiner and director rejected appellant's reliance upon the definitions of "Related Person," as set forth under Ohio Adm.Code 3701-12-01(QQ), and "Affiliated Person," under Ohio Adm.Code 3701-12-01(B). Specifically, the director stated in his decision: "OAC 3701-12-20(J)(5) refers to the term 'related party,' not 'related person.'" The director further noted that the criterion set forth in Ohio Adm.Code 3701-12-20(J)(5) is addressed under paragraph 10.24 of the CON application, in which the applicant is asked to discuss the historical performance of the applicant and "related parties" in providing cost-effective health care services.

{¶36} In general, "[i]n interpreting an agency's statute or rule, a reviewing court 'must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the

legislature has delegated the responsibility of implementing the legislative command.'" *Manor Care of Parma,* supra, at P16. Upon review, we do not find the agency's interpretation to be unreasonable. Further, based upon the evidence presented, we find that the order of the director is supported by reliable, probative, and substantial evidence, and is in accordance with law.

{¶37} Appellant also argues it is entitled to an award of attorney fees as a prevailing party. Appellant's argument is based upon its contention that the director acted beyond the scope of his authority and denied appellant due process in failing to approve the CON application.

{¶38} In light of our above determination that the director did not deny appellant due process or exceed his authority, appellant's argument is moot. Further, appellant is not a "[p]revailing eligible party," pursuant to R.C. 119.092(A)(2), (4), which defines that term to mean "an eligible party that prevails after an adjudication hearing, as reflected in an order entered in the journal of the agency."

{¶39} Based upon the foregoing, appellant's single assignment of error is overruled, and the order of the director of ODH is hereby affirmed.

Order affirmed.

FRENCH and McCORMAC, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX E

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 06-AP-273
(O.D.H. No. 8940-01-05)

[Filed December 20, 2006]

In the Matter of:	)
Wedgewoood Realty,	)
(Appellant).	)
	)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on December 19, 2006, appellant's single assignment of error is overruled, and it is the judgment and order of this court that the order of the director of ODH is hereby affirmed. Costs are assessed against appellant.

BROWN, FRENCH, & McCORMAC, JJ.

/s/
Judge Susan Brown

McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX F

OHIO DEPARTMENT OF HEALTH

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BOB TAFT
Governor

J. NICK BAIRD, M.D.
Director of Health

ADJUDICATION ORDER

In the Matter of: Wedgewood Health Care Center, LLC dba Galion Nursing and Rehabilitation Center

Certificate of Need Application
File Number: ODH 8940-01-05
R.C. 3702.52(C)(3) Predecisional Hearing

WHEREAS, the Director of Health administers the Certificate of Need Program in accordance with Ohio Revised Code sections 3702.51 to 3702.68 and rules adopted by the Public Health Council under those sections;

WHEREAS, on January 19, 2005, Wedgewood Health Care Center, LLC dba Galion Nursing and Rehabilitation Center ("Applicant"), filed a certificate of need application ("CON") with the Ohio Department of Health ("ODH") seeking approval to relocate 50 nursing facility beds from the existing Atwood Manor Care Center to a newly constructed facility in

Galena, Ohio, known as Galion Nursing & Rehab Center ("GNRC");

WHEREAS, GNRC is wholly owned by Mr. Frank Murphy;

WHEREAS, on February 3, 2005, ODH issued a request for additional information, and on March 23, 2005, the Applicant responded;

WHEREAS, on March 30, 2005, ODH issued a second request for additional information. The Applicant responded on May 5, 2005, and ODH declared the application complete on May 20, 2005 but requested additional information for the third time;

WHEREAS, on or about June 17, 2005, Tonya Sheets, Executive Board Member, SEIU, and a resident of Galion, Ohio, individually and on behalf of SEIU (Objectors), filed an objection to the granting of the Applicant's CON application and additionally timely filed written comments on the application;

WHEREAS, on July 22, 2005, Applicant filed a motion to dismiss the objections filed by Objectors arguing that the Objectors were not "affected persons" pursuant to R.C. 3702.51(O) and were not entitled to request an adjudicatory hearing;

WHEREAS, on October 3, 2005, the Hearing Examiner, William Kepko, overruled the Motion to Dismiss, holding that both Ms. Sheets and SEIU were "affected persons" pursuant to R.C. 3702.51(O)(6) in part because they had timely filed written comments on the CON application and had timely filed objections with ODH;

WHEREAS, the record hearing convened and concluded on October 3, 2005;

WHEREAS, Christine Kenney of the CON program recommended approval of the project on October 3, 2005. The approval was based upon the staff report by a former employee, John Hoffman and is dated September 19, 2005. Mr. Hoffman was an SEIU member and did not participate in the recommendation;

WHEREAS, following the hearing and post-hearing briefing schedule, ODH received the Hearing Examiner's Report and Recommendation in which he recommended that the Applicant's CON application not be approved;

WHEREAS, the Department sent the hearing officer's Report and Recommendation to the counsels of record on February 8, 2006, after having received the Report and Recommendation from the Hearing Examiner on January 26, 2006;

WHEREAS, the Applicant and Objectors both timely filed objections to the Report and Recommendation;

WHEREAS, R.C. 3702.52 requires the Director to base a decision concerning an application for which an adjudication hearing is conducted on the Report and Recommendation of the hearing officer;

WHEREAS, Objectors have the burden of proving by a preponderance of the evidence showing that the proposed project is not needed or that granting the CON would not be in accordance with R.C. 3702.51 to R.C. 3702.62 or the rules adopted under R.C. 3702.57;

WHEREAS, the Hearing Examiner found that the Objectors proved by a preponderance of the evidence that the project would not be in accordance with R.C. 3702.51 to R.C. 3702.62 or the rules adopted under R.C. 3702.57;

WHEREAS, the Hearing Examiner based his decision on his findings that Applicant did not provide any information regarding the historical performance in providing cost-effective health care services by the Applicant and related parties to the Applicant [(OAC 3701-12-20-(J)(5)];

WHEREAS, the Hearing Examiner based his decision on his findings that the Applicant failed to address any approved CON applications filed by related parties [OAC 3701-12-20(R)].

WHEREAS, OAC 3701-12-05 (A) prohibits the establishment, development, or construction of a new long-term care facility without a valid certificate of need.

WHEREAS, the Hearing Examiner found that the objectors have proved by a preponderance of the evidence that the construction of GNRC commenced without a valid certificate of need.

WHEREAS, the Applicant filed objections that included: ODH did not serve the Hearing Examiner's Report and Recommendation on the parties within five days as required by R.C. 119.09 and thus the applications is deemed approved under R.C. 3702.52(C)(7); the Objector SEIU is not an "affected person" and thus is not entitled to file a hearing request or participate in a hearing; the Hearing Examiner applied the incorrect burden of proof when he found that the Applicant commenced construction on the facility before a valid certificate of need was issued; and the Hearing

Examiner was incorrect in finding that the Applicant failed to address any other CON applications filed by Mated parties.

NOW THEREFORE, after taking into consideration the Report and Recommendation of the hearing examiner and all briefs, motions, and objections filed, I hereby find as follows:

1. In accordance with R.C. 3702.51 (O)(6), the Objector SEIU is an "affected person" for the purpose of objecting to the subject CON application because the organization timely submitted written comments in the course of review of the CON application.

2. ODH did not send the Report and Recommendation of the Hearing Examiner within 5 days of receiving it from the Hearing Examiner. ODH's mailing of the Report and Recommendation to the parties on February 8, 2006, that it had received from the Hearing Examiner on January 26, 2005, did not prejudice the parties. Further, to hold that the CON application must be approved because it was not mailed within the five day period would prejudice the Objectors. R.C. 119.09 is a statute that is directory in nature, not mandatory. "[A]s a general rule, a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." *Hardy v. Delaware County Board of Revision*, 106 Ohio St. 3d 359, 835 N.E. 2d 348 (2005) quoting *State ex. Rel. Ragozine v. Shaker*, 96 Ohio St.3d 201, 2002 Ohio 3992, 772 N.E.2d 1192, P13, see also, *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 66 N.E.2d 531 (1946). R.C. 3702.52(C)(7) is not applicable as this decision has been rendered prior to thirty days after the expiration of the time for filing objections to the Report and Recommendation of the Hearing Examiner. Moreover, had

the Report and Recommendation been sent out by the fifth day, January 31st, this decision is still made within the 30 day period after the expiration of the time for filing objections to the Report and Recommendation;

3. The Applicant did not provide sufficient information regarding the historical performance in providing cost-effective health care services by the Applicant and related parties to the Applicant [(OAC 3701-12-20-(J)(5)]. The applicant objected to this conclusion contending that the applicant, Wedgewood Health Care Realty, LLC (dba GNRC), was a newly formed entity and that it and its sole member, Frank Murphy, had no related parties. In support of this contention the applicant cited definitions of "Related Person" and "Affiliated Person" contained in OAC 3701-12-01 OAC. Applicant stated that those definitions pertain to persons transferring a CON, and since neither the Applicant nor Mr. Murphy is transferring a CON there is no "related person" to be considered.

However, OAC 3701-12-20(J)(5) refers to the term "related party," not "related person". OAC 3701-12-08(13) states "[e]ach applicant shall submit one original and one copy of the application forms and attachments prescribed by the director." In accordance with R.C. 3702.52(B), these forms provide a format for the presentation of the information required by the CON rules. The criteria contained in OAC 3701-12-20 are presented in a series of items providing specific directions and requesting specific information to satisfy those requirements.

The criteria contained in OAC 3701-12-20(J)(5) is addressed on page 20 of the application form in the following item:

10.24 Discuss the historical performance of the applicant and related parties in providing cost-effective health care service. Identify the current cost/day and payment rate/day (Medicare, Medicaid, private pay, other) of other facilities with similar ownership and services to the proposed/existing facility.

The application showed that Mr. Murphy had an ownership interest in other nursing facilities and some information on those facilities was provided. However, information on the costs and payment rates, and information to explain them such as case-mix and special services or populations was not provided for those facilities. This information is needed to form an opinion on the cost-effectiveness of his operations and the likelihood that the proposed facility will be operated in a cost-effective way. This information is even more important when the applicant is a new business entity, as is the case here, because it does not have a track record of its own. Therefore I find that the Applicant did not provide sufficient information for me to determine whether OAC 3701-12-20(J)(5) has been met.

4. The Applicant failed to address any approved CON applications filed by related parties [OAC 3701-12-20(R)]. OAC 3701-12-20(R) requires the Director to consider the historical performance of the applicant and related parties in complying with previously granted certificates of need. The criteria contained in OAC 3701-12-20(R) is addressed on page 21 of the application form in the following item:

10.34 Identify by facility name, address, county and ODH file number (if known) all other certificates of need granted to the applicant within the past five years and certificates of need that have been granted more than five years ago but have been completed within the past

> five years. For each approved project, provide a description of the approved activity, identify any deviation from the approved activity, discuss any failure to develop the project in accordance with the approved timetable, and identify any fines or settlement agreements associated with the approved project.

In response to this item the sponsor responded "Not applicable." This response was interpreted to mean that the applicant or a related party had not been granted a CON as described in 10.34, although no explicit statement to that effect was made. There was testimony at the hearing indicating that Mr. Murphy, as owner of Sunbury Realty, LLC had received an approved CON in 2003. The Applicant did not provide additional information at the hearing regarding the response to this item in the application. A post-hearing CON staff search of records revealed a CON granted to Sunbury Realty, LLC for Morning View Care Center of Sunbury, ODH File Number 1493-02-03, on February 19, 2004. The records further indicate that Mr. Murphy is the owner of Sunbury Realty, LLC.

5. The Hearing Examiner found that the objectors have proved by a preponderance of the evidence that the construction of GNRC commenced without a valid certificate of need. I decline to adopt this finding. The hearing examiner found, and I agree, that the Applicant commenced construction of a building that the Applicant intends to use as a licensed nursing home. However, R.C. 3702.51(G)(2) provides that the construction of this building is not a "reviewable activity" under R.C. 3702.51(S)(1) until it meets the definition of a "health care facility". R.C. 3702.51 (G)(2) provides that a "health care facility" includes a "nursing home *licensed* under section 3721.02 of the Revised Code"

[emphasis added]. Therefore, under the CON application at issue, there is no "new health care facility" until the building is licensed to provide nursing home care or is required to be licensed as a nursing home under R.C. 3721.02.

The Applicant in this case is assuming the risk that a CON will be granted. If the CON is not granted, the applicant may use the building for other purposes. If the Applicant seeks licensure of the building as a nursing home after approval of the CON, ODH may find that the project was not developed in "substantial accordance with the approved application for the certificate of need" pursuant to R.C. 3702.53 and assess penalties accordingly.

I hereby accept and agree with the Hearing Examiner's findings of fact and agree with his conclusions of law except as otherwise noted herein. For the reasons set forth herein and as delineated in items 3 and 4, above, I hereby deny the Applicant's CON application for the reasons specified herein.

/s/ 3/10/06

J. Nick Baird, M.D., Director of Health **Date**

APPENDIX G

STATE OF OHIO
DEPARTMENT OF HEALTH

ODH FILE NO. 8940-01-05

[Filed January 24, 2006]

IN THE MATTER OF:	)
	)
GALION NURSING & REHAB CTR.	)
CERTIFICATE OF NEED	)
APPLICATION	)
	)

HEARING EXAMINER WILLIAM J. KEPKO

REPORT AND RECOMMENDATION

This matter came on for hearing on October 3, 2005. Present at the hearing on behalf of Wedgewood Health Care Center, LLC (hereinafter "WHCC'" and/or the "Applicant") was Mr. Ted Powell, Administrator. WHCC was represented by Mr. Geoffrey E. Webster, Esq. Also present was Ms. Cathy Meals, Research Analyst with the Service Employees International Union ("SEIU"), District 1199. SEIU was represented by Mr. Mike Hunter, Esq. Also present was Mr. Dennis Nealon, Assistant Attorney General representing the Ohio Department of Health ("ODH" or the "Director") and Mr. John Hoffman, Health Services policy Analyst with ODH.

I. STATEMENT OF THE CASE

On January 19, 2005, Wedgewood Health Care Center, LLC filed a Certificate of Need ("CON") Application with ODH. The CON application proposed the relocation of fifty (50) nursing facility beds from the existing Atwood Manor Care Center ("Atwood Manor") to a newly constructed facility in Galion, Ohio known as Galion Nursing & Rehab Center ("GNRC"). WHCC is owned by Mr. Frank Murphy. Estimated total project cost was $5,705,000.00.

On or about February 3, 2005 ODH issued its First Request for Additional Information. (B00001). Pursuant to OAC 3701-12-08(H)(2), WHCC had ninety (90) days to respond. (B00001). On or about March 23, 2005 WHCC responded. (C00002). In its response to ODH's first request, WHCC indicated that the project costs now exceeded six million dollars.

On March 30, 2005, ODH issued its Second Request for Additional Information. (D00000). Again, WHCC had ninety (90) days to respond. On May 5, 2005, WHCC responded.

On May 20, 2005, ODH declared the CON application complete. In the declaration, WHCC was required to publish certain specific notices regarding the project and was advised that further clarifications might be necessary. (F00000 & F00001). ODH's decision on WHCC's CON application was due on or before August 18, 2005. (F00001). Mr. John Hoffman was the reviewer. WHCC published all public notices. (G00000).

Also in the declaration, ODH requested additional information. (F00001). On June 29, 2005, WHCC timely responded.

On June 17, 2005, Ms. Tonya Sheets, Executive Board Member, SEIU and a resident of Galion, individually and on behalf of SEIU, filed an objection to Galion's CON application. (I00001). Ms. Sheets also requested an adjudication hearing. (The SEIU and Ms. Sheets, hereinafter collectively referred to as the "Objectors").

On June 23, 2005, ODH notified WHCC and the SEIU that, on motion of ODH, the adjudication hearing that was scheduled for July 1, 2005 was continued and that a teleconference was scheduled for July 15, 2005 with the parties and the undersigned Hearing Examiner. The telephone conference took place on July 15, 2005 and all parties attended.

On July 22, 2005 WHCC filed a motion to dismiss the objections and comments filed by Ms. Sheets and the SEIU, arguing that none of these individuals and/or entities were "affected persons" pursuant to R.C.3702.51(O) and the objections filed by Tonya Sheets and the SEIU District 1199 were not received by ODH in a timely manner. On August 1, 2005 SEIU filed their memorandum in opposition. On August 15, 2005 the undersigned Hearing Examiner overruled the Motion to Dismiss, holding that Ms. Sheets and the SEIU were "affected persons" and that the objections were timely filed with ODH.

On October 3, 2005, ODH staff recommended approval of the project. The approval was based on a staff report from Mr. John A. Hoffman, dated September 19, 2005. Mr. Hoffman is a member of the SEIU and, because of his affiliation with the union, did not participate in the recommendation.

The hearing was conducted in accordance with R.C. 3702.52(C)(3) and Chapter 119 of the Ohio Revised Code. The record reflects that all parties had sufficient and legal notice of the time and place of the hearing. (L00001, L00002, L00003 & Scheduling Order).

II. DISCUSSION OF THE EVIDENCE

Testifying on behalf of the Objectors was Ms. Cathy Meals. Ms. Meals is a research analyst with the SEIU and assisted with the preparation of the written comments and objections to Galion's CON application. The SEIU is a twenty-eight thousand (28,000) member health care and social services union. The SEIU represents workers at nursing homes and currently represents workers at two nursing facilities in Crawford County.

Ms. Meals, as did the objections filed by Ms. Sheets, raised five categories of objections. Each will be reviewed separately.

1. **The applicant has neither demonstrated the need for this facility nor adequately demonstrated the impact of this project on other Crawford County nursing facilities.**

The Objectors argue that if this project is approved, it would have a deleterious effect on other nursing homes in Galion and Crawford County. Based on data from Medicare's Nursing Home Compare Database, taken at a time when Atwood Manor was in existence, the Objectors contend that the average Crawford County nursing home occupancy rates average 76.38% compared with an occupancy rate of 87.73% statewide. If the Atwood home beds were taken out of existence rather than converted to Galion, the occupancy rates

in Crawford County would be 86.27% which is close to the state average. The objectors conclude that, based on these averages, the Galion project is not needed and should not be approved by ODH.

> On cross-examination, however, Ms. Meals at Tr. 55-56 stated a follows:
>
> Based on what we have looked at in terms of occupancy, we believe that 50 beds and additional beds may be necessary to meet bed need at some future time, assuming that the number of - that the proportion of people age 65 plus going into nursing homes remains about the same. Yes that could be a true statement, but that is, you know, conditional on the maintenance of that some proportion, you know, barring more and more people using the Passport program or otherwise obtaining home care services or whatever else.

Ms. Meals also testified on cross-examination that the over-65 in Crawford County will grow by 27.11% over the next twenty years, and possibly higher based on projected growth rates in contiguous counties.

2. The Applicant has proposed unrealistic operating projections.

The Objectors contend that, since the Applicant's proposed census of 93% is significantly higher than other stand alone facilities in Crawford County, the Applicant's projected operating figures are based on unreasonable assumptions and do not reflect the viability of the project. In her testimony, Ms. Meals stated that the average occupancy rates for facilities in Ohio that had between 40 and 60 beds

was 87%. Tr. 28. In Crawford County the average occupancy rate was 76%, therefore, Ms. Meals concludes that the Applicant's projections are not reasonable. On the application, the Applicant indicates that occupancy rates for the first year are only 73%. (A00026).

3. The Applicant did not demonstrate the cost-effectiveness of his proposed project relative to other alternatives, nor were any other alternatives to the project considered.

The Objectors contend that the Applicant did not address any alternatives to the proposed project nor did the Applicant discuss the advantages, disadvantages and costs of each alternative. Tr. 29. In her testimony, Ms. Meals at Tr. 29, testified that - "in reading this application over, there were clearly not any alternatives concretely discussed, including not building the facility at all."

ODH, however, did consider the cost of rehabilitating Atwood Manor as an alternative to this project. ODH determined that the cost of expanding room size and to meet all modern codes would be expensive and would result in the utilization of an old facility. Ex. K-5.

4. The Applicant provided incomplete information in his application and has failed to respond fully to subsequent questions from ODH or to meet ODH's requirements for CON applications.

The Objectors raise several issues.

i. The Applicant did not adequately consider alternatives to the Proposed Project.

This issue has been discussed in paragraph 3, above.

ii. The Applicant has not provided sufficient information to establish the financial feasibility of the project.

The Objectors contend that the Applicant has failed to submit the name and address of the general contractor for the project. Tr. 30. The evidence indicates that, at the time of the hearing, a general contractor had not been selected.

The Objectors also state that the Applicant did not fully describe the short and long term financial feasibility and effectiveness of the project. The Applicant did provide operating statements that were reviewed by ODH. (K00006). The projected operating statements were provided for the first three years of operation and indicated an initial loss of approximately $260,000.00 with modest earnings for the next two years. The operating statements appear to be reasonable and were, according to ODH, in line with other comparable facilities. Although the Applicant has projected a 93% occupancy rate by the ninth month of operation, the rate may be reasonable given that this is a new facility and all the rooms will be private.

iii. The Applicant has failed to provide information regarding its own history serving medically under served groups.

In response to question 10.12 in the CON application requiring a discussion of the Applicant's historical experience in serving the health related needs of the medically under

served groups, the Applicant, in addition to discussing the general needs of the medically under served, responded as follows:

> GNRC will serve the medical needs of the low-income elderly and disabled without an income preference. (A00050).

The Applicant argues that the response is insufficient and unresponsive. While the response could have been more expansive, the evidence does indicate that GNRC will serve the Medicaid population (A00034) which, characteristically, is an elderly population, functionally impaired and without resources to afford long term care. (A00050). In addition, the Applicant's response to question 10.7(e) indicates that the Applicant intends to serve the elderly and disabled populations in their service areas. (A00046).

iv. The Application lacks sufficient information regarding proposed staffing of the GNRC Facility

On the Application at question 10.26, the Applicant was asked to identify the resources available to the Applicant for obtaining the additional staff required. The Applicant responded by stating that "... it is expected the staff necessary to occupy the positions at the new facility will either relocate or the employment pool will shift to accommodate the new facility without disrupting the labor pool for other providers." (A00056).

On the Application at question 10.28, the Applicant was asked to document that the appropriate ancillary and support services are available and discuss the impact of the project on these services. The Applicant responded by stating as follows:

> Services available by full time professional and support service staff will include nursing, dietary, laundry, activities and social services. In addition, GNRC will have contractual relationships with outside resources, including physicians, podiatrists, therapists and dentists to meet the needs of the residents.

The Objectors find the responses to questions iii and iv insufficient. No testimony was provided by the Applicant at the hearing on these issues and the Applicant did not address this issue in its post hearing brief.

v. The historical performance of the applicant and related parties providing cost-effective health care services.

The Objectors contend that the Applicant, both in the Application and in their responses to subsequent questions from ODH, failed to provide sufficient information documenting the historical performance of the Applicant and related parties providing cost-effective health care services. The Applicant, at question 17, requests that the Applicant and the Operator provide historical financial statements for the past two years. The Applicant responded that, since neither the Applicant nor the Operator were in existence prior to the CON application, there are no historical financial statements. (C00008).

In the second request for information, ODH requested financial reports from Mr. Murphy and his financial entities. (D00002). In their response, the Applicant submitted a letter from a bank that ODH accepted as confirmation of the availability of personal funds. (E00002).

5. The Applicant has failed to implement at least one prior approved CON project. The applicant has other pending CON applications that have not been addressed inasmuch as they will have an aggregate impact upon the applicant's financial position.

OAC Section 3701-12-20(R) requires the Director to consider the historical performance of the Applicant and related parties in complying with previously granted certificates of need. The testimony indicates that Sunbury Realty, an LLC owned by Mr. Frank Murphy, had a CON approved in 2003. (Tr. 41). In addition, apparently, another CON application by a Murphy controlled entity, entitled Loeb Lomond Care Center, was either denied by ODH or recommended for denial. (Tr. 41).

On the application, ODH, at question 10.34, asked the Applicant to identify all other CON applications granted to the Applicant within the last five years. The Applicant answered that the question was not applicable in that the Applicant had not filed any previous applications. No testimony was provided by the Applicant regarding this issue.

6. Construction of a new long term care facility without a CON.

A final issue that has been raised in the hearing and in the briefs that were filed by the parties concerns whether the Applicant has started construction on a new long term care facility without a valid Certificate of Need. R.C. § 3702.53 in relevant part states as follows:

> (A) No person shall carry out any reviewable activity unless a certificate of need for such activity has been granted under sections 3702.51 to 3702.62 of the

> Revised Code or the person is exempted by division (T) of section 3702.51 or section 3702.527, 3702.528, 3702.529, 3702.5210 [3702.52.7, 3702.52.8, 3702.52.9, 3702.52.10], or 3702.62 of the Revised Code from the requirement that a certificate of need be obtained.

According to OAC Section 3701-12-05 (A), the following activities are reviewable activities which shall not be conducted without a valid certificate of need.

(1) The establishment, development, or construction of a new long-term care facility.

Not only is a person prohibited from carrying out a reviewable activity, the Ohio Revised Code provides for a comprehensive investigatory scheme to be conducted by ODH that can result in fines and sanctions to a person who violates this section.

At the hearing, the Objectors provided evidence that construction had begun on this project. Cathy Meals testified that she personally visited the construction and observed construction activities. (Tr. 31). The photographs admitted into evidence clearly indicate construction activity. (Objector's Exhibit 1).

While the Applicant cross-examined Ms. Meals regarding whether construction had begun, the Applicant did not deny that construction had begun on this Facility. On the other hand, in the application on page A00019, the Applicant stated to ODH that construction would not begin until four months after approval of the CON. In fact, zoning, completion of drawings and the finances were not to be completed until one month after approval of the CON.

III. FINDINGS OF FACT

1. On January 19, 2005 Wedgewood Health Care Center, LLC ("WHCC") filed a Certificate of Need ("CON") Application with ODH. The CON application proposed the relocation of fifty (50) nursing facility beds from the existing Atwood Manor Care Center ("Atwood Manor") to a newly constructed facility in Galion, Ohio known as Galion Nursing & Rehab Center.

2. WHCC is wholly-owned by Mr. Frank Murphy.

3. Estimated total project cost was $5,705,000.00.

4. On or about February 3, 2005 ODH issued its First Request for Additional Information. (B00001). Pursuant to OAC 3701-12-08(H)(2), Galion had ninety (90) days to respond. (B00000).

5. On or about March 23, 2005 Galion responded. (C00002). In its response to ODH's first request, Galion indicated that the project costs now exceeded six million dollars.

6. On March 30, 2005 ODH issued its Second Request for Additional Information. (D00000). Again, Galion had ninety (90) days to respond.

7. On May 5, 2005 Galion responded.

8. On May 20, 2005 ODH declared the CON application complete. In the declaration, Galion was required to publish certain specific notices regarding the project and was advised that further clarifications might be

necessary. (F00000 & F00001). ODH's decision on Galion's CON application was due on or before August 18, 2005. (F00001). Mr. John Hoffman was the reviewer.

9. Galion published all public notices. (G00000).

10. In the declaration whereby ODH declared the Application complete, ODH requested additional information. (F00001). On June 29, 2005, Galion timely responded.

11. On June 17, 2005 Ms. Tonya Sheets, Executive Board Member, SEIU and a resident of Galion, individually and on behalf of SEIU, filed an objection to Galion's CON application. (I00001). Ms. Sheets also requested an adjudication hearing.

12. The SEIU is a twenty-eight thousand (28,000) member health care and social services union. The SEIU represents workers at nursing homes and currently represents workers at two nursing facilities in Crawford County.

13. On June 23, 2005 ODH notified Galion and the SEIU that, on motion of ODH, the adjudication hearing that was scheduled for July 1, 2005 was continued and that a teleconference was scheduled for July 15, 2005 with the parties and the undersigned Hearing Examiner.

14. The telephone conference took place on July 15, 2005 and all parties attended.

15. On July 22, 2005 Galion filed a motion to dismiss the objections and comments filed by Ms. Sheets and the

SEIU, arguing that none of these individuals and/or entities were "affected persons" pursuant to R.C.3702.51(O) and the objections filed by Tonya Sheets and the SEIU District 1199 were not received by ODH in a timely manner.

16. On August 1, 2005 SEIU filed their memorandum in opposition.

17. On August 15, 2005 the undersigned Hearing Examiner overruled the Motion to Dismiss, holding that Ms. Sheets and the SEIU were "affected persons" and that the objections were timely filed with ODH.

18. On October 03, 2005 Christine Kenney recommended approval of the project.

19. The approval was based on a staff report from Mr. John A. Hoffman, dated September 19, 2005. Mr. Hoffman is a member of the SEIU and, because of his affiliation with the union, did not participate in the recommendation.

20. The hearing took place on October 3, 2005. The hearing was conducted in accordance with R.C. 3702.52(C)(3) and Chapter 119 of the Ohio Revised Code.

21. The record reflects that all parties had sufficient and legal notice of the time and place of the hearing. (L00001, L00002, L00003 & Scheduling Order).

22. The Objectors raised an issue at the hearing that the Applicant has not demonstrated the need for this

facility nor adequately demonstrated the impact of this project on other Crawford County nursing facilities.

23. The evidence indicates that the construction of this Facility will have no effect on other nursing homes since fifty beds will relocated from one facility that is closing to a newer, more modern facility. The evidence also indicates that, for the same reason, the effect on occupancy rates in Crawford County will not be significantly impacted.

24. Construction of the facility is necessary to meet the needs of residents in Crawford County, particularly if the number of over-65 in Crawford County will increase as predicted.

25. The Objectors contend that the Applicant has proposed unrealistic operating projections.

26. The Applicant has submitted three years of detailed operating statements, cash flow statements, projected ratios and statements of operations prepared by Certified Public Accounts, Cummins, Krasik & Hohl Co. (E00006). While occupancy is projected to be 93% in year two of operations, initial occupancy rates are not projected at 93% until the ninth month of operation and, in the application, were projected to be 73%. Furthermore, projected operating expenses were based on a similar-sized facility that is currently being operated by the Applicant. (E00020). A review of the entire projected financial statements indicates that the operating projections are sound and consistent with generally acceptable accounting practices.

27. The Objectors argue that the Applicant did not demonstrate the cost-effectiveness of his proposed project relative to other alternatives, nor were any other alternatives to the project considered.

28. ODH considered the cost of rehabilitating Atwood Manor as an alternative to this project and determined that the cost of expanding room size and to meet all modern codes would be expensive and would result in the utilization of an old facility. The Applicant has, therefore, demonstrated the cost-effectiveness of the proposed project relative to remodeling Atwood Manor and the remodeling of Atwood Manor was considered as an alternative to this project.

29. The Objectors argue that the Applicant has not provided sufficient information to establish the financial feasibility of the project.

30. The Applicant has provided detailed operating statements that demonstrate the financial feasibility of the proposed project.

31. The Objectors argue that the Applicant has failed to provide information regarding its own history serving medically under served groups.

32. The evidence indicates that Frank Murphy is related to or owns the controlling interest in a number of nursing facilities that serve a Medicaid population. In addition, GNRC will serve the Medicaid population (A00034) which, characteristically, is an elderly population, functionally impaired and without resources to afford long term care. (A00050). The Applicant, therefore,

has provided sufficient information regarding its history of servicing medically under served groups.

33. The Objectors contend that the Application lacks sufficient information regarding proposed staffing of the GNRC Facility.

34. The Applicant has demonstrated that there are resources available for obtaining staff based on operating revenues that are project from the proposed operating statements (E0006). The Applicant has also discussed the availability of ancillary and support services and whether those services will be provided by staff and/or contractual relationships with outside resources.

35. The Objectors argue that the Applicant has not provided any information regarding the historical performance of the Applicant and related parties providing cost-effective health care services.

36. Since GNRC does not yet exist, there is no history or providing cost-effective health care services.

37. The Applicant has failed to provide information regarding the historical performance of related parties providing cost-effective health care services.

38. The Objectors contend that the Applicant has not addressed other pending CON applications or their aggregate impact upon the Applicant's financial position.

39. GNRC is not yet in existence and WHCC has not filed any other applications for a CON.

40. The Applicant has failed to address any other CON applications filed by related parties.

41. The Applicant has begun the establishment, development or construction of a new long-term care facility construction without first obtaining a valid CON.

IV. CONCLUSIONS OF LAW

1. The affected persons bear the burden of proving by a preponderance of the evidence that the project is not needed or that granting the certificate would not be in accordance with sections 3702.51 to 3702.62 of the Revised Code or the rules adopted under section 3702.57 of the Revised Code.

2. The Objectors have not overcome their burden of proving that the project is not needed or that the Applicant has not adequately demonstrated the impact of this project on other Crawford County nursing facilities.

3. OAC 3701-12-20(F) requires the director to consider the impact of the project on all other providers of similar services in the HSA including the impact on their utilization, market share and financial status.

4. The Objectors have not overcome their burden that the granting the CON would not be in accordance with OAC 3701-12-20(F).

5. The Objectors have not proven by a preponderance of the evidence that the Applicant's proposed operating projections are unrealistic.

6. OAC 3701-12-20(G) requires the Director to consider alternatives to the project and the advantages, disadvantages and costs of each alternative.

7. The Objectors have not proven by a preponderance of the evidence that granting of the CON will not be in compliance with OAC 3701-12-20(G).

8. OAC 3701-12-20(J) requires that the director shall consider the short-term and long-term financial feasibility and the cost effectiveness of the project and its financial impact upon the applicant, other providers, health care consumers and the medicaid program established under Chapter 5111. of the Revised Code.
Among other relevant matters, the director shall evaluate:
(1) The availability of financing for the project, including all pertinent terms of any borrowing, if applicable;
(2) The operating costs specific to the project and the effect of these costs on the operating costs of the facility as a whole based upon review of balance sheets, cash flow statements and available audited financial statements;
(3) The effect of the project on charges and payment rates for the facility as a whole and specific to the project; and
(4) The costs and charges associated with the project compared to the costs and charges associated with similar services furnished or proposed to be furnished by other providers

9. The Applicant has provided by a preponderance of the evidence that the project is financially feasible and

cost effective and that granting the Application will be in compliance with in compliance with OAC 3701-12-200)(1-4).

10. OAC 3701-12-20(J) (5) requires that the director evaluate the historical performance of the Applicant and related parties in providing cost-effective health care services. Specifically, 3701-12-20(J)(5) states as follows:

(J) The director shall consider the short-term and long-term financial feasibility and the cost effectiveness of the project and its financial impact upon the applicant, other providers, health care consumers and the medicaid program established under Chapter 5111. of the Revised Code.

Among other relevant matters, the director shall evaluate:

(5) The historical performance of the applicant and related parties in providing cost-effective health care services.

11. The Applicant has failed to provide any information regarding the historical performance of related parties to the Applicant in providing cost-effective health care services.

12. OAC 3701-12-20(1) requires the Director to consider the effectiveness of the project in meeting the health-related needs of medically underserved groups such as low-income individuals, handicapped individuals and minorities. If applicable, this consideration shall

include review of the applicant's historical experience in meeting the needs of under served groups.

13. The Objectors have failed to meet their burden that the granting of a CON in this matter would not be in compliance with OAC 3701-12-20(I).

14. The Objectors have not met their burden that the Application lacks sufficient information regarding proposed staffing of GNRC.

15. OAC 3701-12-20(R) requires the Director to consider the historical performance of the applicant and related parties in complying with previously granted certificates of need.

16. The Applicant has failed to address any approved CON applications filed by related parties.

17. OAC 3701-12-05 (A) prohibits the establishment, development, or construction of a new long-term care facility without a valid certificate of need.

18. The Objectors have proven by a preponderance of the evidence that the construction of GNRC has begun without a valid certificate of need.

V. RECOMMENDATION

Based on the findings of fact and conclusions of law and for the reasons expressed herein, it is the finding of the hearing examiner that the Objectors have proven by a preponderance of the evidence that the Certificate of Need Application submitted by Wedgewood Health Care Center, LLC is not in accordance with the rules adopted under section

3702.57 of the Revised Code. The Application is not in accordance with OAC 3701-12-20(J) (5), OAC 3701-12-20(R) and OAC 3701-12-05 (A).

It is **THEREFORE RECOMMENDED** that the Director not approve the Certificate of Need Application.

/s/
William J. Kepko(0033613)
Hearing Examiner
January 24, 2006

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing REPORT AND RECOMMENDATION was served by regular U.S. mail, postage prepaid to the Ohio Department of Health, c/o Carol L. Ray, Esq., Assistant Counsel, Office of Legal Services 246 North High Street, Columbus, Ohio 43266-0588 on January 24, 2006.

/s/
William J. Kepko (0033613)

APPENDIX H

TITLE 1. STATE GOVERNMENT
CHAPTER 119. ADMINISTRATIVE PROCEDURE
AGENCY POWERS; ADJUDICATION HEARINGS

Ohio Rev. Code Ann. § 119.09. Adjudication hearing

As used in this section "stenographic record" means a record provided by stenographic means or by the use of audio electronic recording devices, as the agency determines.

For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may require the attendance of such witnesses and the production of such books, records, and papers as it desires, and it may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas, and for that purpose the agency may, and upon the request of any party receiving notice of the hearing as required by section 119.07 of the Revised Code shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The fees and mileage of the sheriff and witnesses shall be the same as that allowed in the court of common pleas in criminal cases. Fees and mileage shall be paid from the fund in the state treasury for the use of the

agency in the same manner as other expenses of the agency are paid.

An agency may postpone or continue any adjudication hearing upon the application of any party or upon its own motion.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein.

At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof presented at the hearing. This paragraph does not require a stenographic record at every adjudication hearing. In any situation where an adjudication hearing is required by sections 119.01 to 119.13 of the Revised Code, if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court. The rules of an agency may specify the situations in which a stenographic record will be made only on request of the party; otherwise such a record shall be made at every adjudication hearing from which an appeal to court might be taken.

The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may call any party to testify under oath as upon cross-examination.

The agency, or any one delegated by it to conduct an adjudication hearing, may administer oaths or affirmations.

In any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may appoint a referee or examiner to conduct the hearing. The referee or examiner shall have the same powers and authority in conducting the hearing as is granted to the agency. Such referee or examiner shall have been admitted to the practice of law in the state and be possessed of such additional qualifications as the agency requires. The referee or examiner shall submit to the agency a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by certified mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation, which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the

referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.

After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

3701 HEALTH DEPARTMENT
PUBLIC HEALTH COUNCIL
Chapter 3701-12. CERTIFICATE OF NEED PROGRAM

Ohio Admin. Code § 3701-12-20 General certificate of need review criteria

(A) The director shall apply each of the criteria prescribed in this rule, as applicable, when reviewing an application for a certificate of need, in addition to any criteria specific to the application that are established by this chapter of the Administrative Code. An applicant for a certificate of need shall provide sufficient information to enable the director to perform a thorough review of the application in relation to each relevant criterion established by this chapter of the Administrative Code by completely responding to each applicable portion of the application form and attachments prescribed by the director and by attaching the necessary supporting documentation.

(B) For projects involving any new construction, renovation or remodeling, the director shall consider:

(1) The costs, methods and type of construction including energy conservation features, if applicable;

(2) The current and projected zoning status of the project site, if applicable; and

(3) Space allocations and the configuration of existing and proposed areas.

(C) If applicable, the director shall consider the relationship of the project to the most current edition of the "State Health Plan."

(D) If applicable, the director shall consider the relationship of the project to the long-range plan of the applicant and the planning process that the applicant has employed.

(E) The director shall consider the need that the population served or proposed to be served has for the services to be provided upon implementation of the project. In assessing the need for a project, the director shall examine:

(1) The current and proposed primary and secondary service areas and their corresponding population;

(2) Travel times and the accessibility of the project site and of the sites of similar services to the proposed service area population;

(3) Current and projected patient origin data, by zip code;

(4) Any special needs and circumstances of the applicant or population proposed to be served by the proposed project, including research activities, prevalence of a particular disease, unusual demographic characteristics, cost-effective contractual affiliations, and other special circumstances and

(5) Special needs related to any research activities, such as participation by the applicant in research conducted by the United States food and drug administration or clinical trials sponsored by the national institute of health, that will be conducted as a result of implementation of the reviewable activity.

(F) The director shall consider the impact of the project on all other providers of similar services in the HSA including the impact on their utilization, market share and financial status.

(G) The director shall consider alternatives to the project and the advantages, disadvantages and costs of each alternative.

(H) If the project involves an existing health care facility, the director shall consider the historical, current and projected

utilization of the facility as a whole and the utilization specific to the services affected by the project.

(I) The director shall consider the effectiveness of the project in meeting the health-related needs of medically underserved groups such as low-income individuals, handicapped individuals and minorities. If applicable, this consideration shall include review of the applicant's historical experience in meeting the needs of under-served groups.

(J) The director shall consider the short-term and long-term financial feasibility and the cost effectiveness of the project and its financial impact upon the applicant, other providers, health care consumers and the medicaid program established under Chapter 5111. of the Revised Code.

Among other relevant matters, the director shall evaluate:

(1) The availability of financing for the project, including all pertinent terms of any borrowing, if applicable;

(2) The operating costs specific to the project and the effect of these costs on the operating costs of the facility as a whole based upon review of balance sheets, cash flow statements and available audited financial statements;

(3) The effect of the project on charges and payment rates for the facility as a whole and specific to the project; and

(4) The costs and charges associated with the project compared to the costs and charges associated with similar services furnished or proposed to be furnished by other providers,; and

(5) The historical performance of the applicant and related parties in providing cost-effective health care services.

(K) The director shall consider the impact of the project on existing staffing levels, if applicable, and the availability of

personnel resources to meet the applicant's projected requirements.

(L) If medical or allied health education is an integral part of the project, the director shall examine the impact of the project on the advancement of the educational endeavor.

(M) The director shall consider the availability of and the impact upon ancillary and support services that relate directly and indirectly to the project.

(N) The director shall consider the extent to which the project, the facility as a whole and the applicant comply and will comply with applicable standards for licensure, certification, accreditation and similar approvals.

(O) The director shall consider the need for and the availability in the community of services and hospitals for osteopathic physicians and their patients and the impact of the project on existing and proposed institutional training programs for doctors of osteopathy and doctors of medicine at the student, internship and residency training levels.

(P) The director shall consider the special needs and circumstances resulting from moral and ethical values and the free exercise of religious rights of health care facilities administered by religious organizations.

(Q) The director shall consider the special needs and circumstances of children's hospitals, inner city hospitals, and small rural hospitals.

(R) The director shall consider the historical performance of the applicant and related parties in complying with previously granted certificates of need.